No. 84-518, No. 84-710

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

ROBERT W. JOHNSON, *et al.*,
Petitioners,

v.

MAYOR and CITY COUNCIL OF BALTIMORE, *et al.*,
Respondents.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
Petitioner,

v.

MAYOR and CITY COUNCIL OF BALTIMORE, *et al.*,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AMICUS CURIAE BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK

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Interest of *Amicus*

The State of New York, by its Attorney General, Robert Abrams, submits this brief as *amicus curiae* pursuant to Supreme Court Rule 36.4.

The State of New York has enacted legislation which establishes age as a factor in the employment of state and local law enforcement officers. Under the New York Civil Service Law, one must, with certain exceptions, be under the age of 30 to be eligible for appointment as a state or local police officer. Civil Service Law, § 58 (subd. 1, par.[a]). Under the New York Retirement and Social Security Law, a mandatory retirement age of 55 has been set for state police officers. Retirement and Social Security Law, § 381-b (subd. e). These statutes are presently under separate challenge in federal court. *Hahn* v. *City of Buffalo*, 596 F. Supp. (W.D.N.Y. 1984), *app. pending* (challenge to Civil Service Law); *EEOC* v. *State of New York*, No. 84-CV-12 (N.D.N.Y.) (challenge to Retirement and Social Security Law).

In *Hahn*, the district court invalidated section 58(1)(a) of the Civil Service Law, finding, after a lengthy trial, that the statute conflicts with the Federal Age Discrimination in Employment Act (29 U.S.C. § 621 et seq.). In *EEOC* v. *State of New York*, the Attorney General's motion for summary judgment based on the same legal issues as are raised here was denied. Thus, the Court's decision in this case will have a significant impact on the employment of law enforcement officers in New York State.

Summary of Argument

The determination of whether age is a BFOQ reasonably necessary for law enforcement and firefighting does not require case-by-case litigation. For these occupations, Congress has established age 55 as a statutory standard on which state and local governments may rely. 5 U.S.C. § 8335(b).

The age limit established under 5 U.S.C. § 8335(b) is easily harmonized with congressional concern, under the ADEA, about age discrimination in employment. Under the ADEA, age may be considered only insofar as it is a reasonably necessary BFOQ. Under 5 U.S.C. § 8335(b), Congress has established that age *is* a BFOQ for police and firefighters. Thus, a federal standard has been established on which state and local governments may rely in their attempts to comply with the ADEA.

The failure of some courts to apply this statutory BFOQ has resulted in the unnecessary invalidation of state and local laws compelling police and firefighters to retire at the age of 55. These courts have mistakenly presumed that there is an irreconcilable conflict between these state and local laws and the Federal Age Discrimination in Employment Act. 29 U.S.C. § 621 et seq. However, simply recognizing that 5 U.S.C. § 8335(b) provides a reasonable federal standard upon which to establish a BFOQ for state or local police or firefighters would have obviated the need to find statutory conflict in these cases. By doing so, the strong policy against invalidating state or local laws, where conflict with federal law is avoidable, is advanced. The Fourth Circuit adopted such a common-sense approach.

Moreover, allowing reliance on 5 U.S.C. § 8335(b) to establish retirement ages for state or local police and firefighters is compatible with the purposes and objectives of Congress. Congress has expressed concern that litigation not be the sole means of establishing a BFOQ, and has recommended that generic standards or guidelines be used. Under 5 U.S.C. § 8335(b), Congress itself has established such a guideline. The legislative history of this statute is replete with congressional statements about the need for relatively young law enforcement officers and firefighters. No distinction was drawn between federal and nonfederal employees in these occupations. Clearly, Congress has con-

cluded that a mandatory retirement age limit of 55 is reasonably necessary to law enforcement and firefighting operations.

ARGUMENT

The Mandatory Retirement Age of 55 Established by Congress for Federal Law Enforcement Officers and Firefighters Should, as a Matter of Law, Be Deemed a Bona Fide Occupational Qualification for State and Local Law Enforcement Officers and Firefighters.

In 1967, Congress passed the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. The ADEA prohibited employers from discriminating against persons 40 to 65 years old because of age.* The Act specifically made it unlawful for an employer to discharge a worker on such a basis. 29 U.S.C. § 623(a). However, Congress recognized that some employment practices based on age may be justifiable. Accordingly, it provided that age as an employment criterion is unlawful "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . . ." 29 U.S.C. § 623(f)(1).

As originally passed in 1967, the ADEA did not apply to the United States Government, the states or their political subdivisions. However, in 1974, Congress extended the Act to cover these governmental bodies.** Federal work-

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* In 1978, the general protection of the ADEA was raised to age 70. Age Discrimination in Employment Act Amendments of 1978, Pub. L. No. 95-256, 92 Stat. 189 (1978).

** Under § 11(b) of the ADEA, the definition of "employer" was expanded to include "a State or a political subdivision of a State and

(footnote continued on following page)

ers were covered under section 15 of the Act. 29 U.S.C. § 633a. Although Congress created an independent enforcement machanism for federal employment, the same restrictions and standards applied to federal, state and local employers: age discrimination was prohibited unless it could be shown that age is a BFOQ necessary to the performance of the duties of the position. 29 U.S.C. §§ 623 (f)(1), 633a.

Significantly, in the same year in which Congress extended the ADEA to government employers, it also established a mandatory retirement age for two federal occupations. Pub. L. No. 93-350, 88 Stat. 356 (1974), 5 U.S.C. § 8335(b). Under this statute, a law enforcement officer* or firefighter must retire on the last day of the month in which he or she becomes 55 years old or completes 20 years of service, whichever comes later.

Like Congress, the City of Baltimore has established a mandatory retirement age of 55 for its firefighters. However, on this appeal, petitioners argue that this local law conflicts with the ADEA and must, therefore, be invalidated. They contend that the validity of state and local laws setting mandatory retirement ages for police and fire-

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(footnote continued from preceding page)

any agency or instrumentality of a State or political subdivision of a State. . . . " 29 U.S.C. § 630(b). In *EEOC* v. *Wyoming*, 460 U.S. 226 (1983), this Court found that the extension of the ADEA to state and local governments did not violate the doctrine of Tenth Amendment immunity articulated in *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), overruled by *Garcia* v. *San Antonio Metropolitan Transit Authority*, — U.S. —, 53 U.S.L.W. 4135 (February 19, 1985).

* 5 U.S.C. § 8331(20) defines law enforcement officer as "an employee, the duties of whose position are primarily the investigation, apprehension, or detention of individuals suspected or convicted of offenses against the criminal laws of the United States."

fighters may not be based on the federal age limit established by Congress under 5 U.S.C. § 8335(b). The State of New York disagrees.

The standards for determining whether state and local laws are invalid under the Supremacy Clause, because of a conflict with a federal statute, are well established. First, courts indulge a rule of construction which avoids finding a conflict, if at all possible. *Chicago & North Western Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151 (1978). This Court has a strong policy against invalidating state and local laws in the absence of a clear showing of irreconcilable conflict. *Seagram & Sons, Inc.* v. *Hostetler*, 384 U.S. 35, 45 (1966); *Huron Portland Cement Co.* v. *Detroit*, 362 U.S. 440, 446 (1960). Second, a conflict will be found only where the state or local law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress . . ." *Hines* v. *Davidowitz*, 312 U.S. 399, 404 (1941). See also, *Lime and Avocado Growers* v. *Paul*, 373 U.S. 132 (1963). Third, when interpreting a legislative scheme, this Court looks to the whole of the statute or statutes on the same subject to find " 'such a construction as will carry into execution the will of the legislature' ". *Kokoszka* v. *Bedford*, 417 U.S. 642, 650 (1974), quoting *Brown* v. *Duchesne*, 19 How. 183, 194 (1857). These standards require that the federal statutory scheme which explicitly authorizes a mandatory retirement age limit for federal police and firefighters be regarded as likewise authorizing, rather than displacing, state and local laws directing precisely the same result.

A. Allowing Reliance on the Mandatory Retirement Age of 55 Under 5 U.S.C. § 8335(b) to Establish Retirement Ages for State and Local Police and Firefighters Avoids an Unnecessary Conflict Between Federal Law and State and Local Laws.

Prior to 1974, when the ADEA did not apply to state and local governments, government employers were afforded a "relatively relaxed standard" in establishing mandatory retirement age limits, and the validity of these limits was consistently upheld. *Massachusetts Board of Retirement* v. *Murgia,* 427 U.S. 307, 314 (1976) (rational relationship standard applied in upholding the constitutionality of a state statute requiring that state police officers retire at age 55); *Vance* v. *Bradley,* 440 U.S. 93 (1979) (mandatory retirement age of 60 for participants in Foreign Service Retirement System upheld.)

However, since the 1974 extension of the ADEA, a host of lawsuits have challenged the mandatory retirement age limits established by state and local governments. Most of these lawsuits have involved law enforcement officers and firefighters.* Indeed, in his concurring opinion in *EEOC* v. *Wyoming,* 103 S. Ct. at 1069-1070 n. 2, Justice Stevens noted that more than half the states have mandatory retire-

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* See, for example, *EEOC* v. *Missouri State Highway Patrol,* 748 F.2d 447 (8th Cir. 1984); *Mahoney* v. *Trabucco,* 738 F.2d 35 (1st Cir. 1984), *petition for cert. denied,* — U.S. —, 53 U.S.L.W. 403 (1984) (State police officers); *EEOC* v. *City of St. Paul,* 671 F.2d 1162 (8th Cir. 1982) (firefighters); *Heiar* v. *Crawford County, Wisc.,* 746 F.2d 1190 (7th Cir. 1984) (police officers); *Orzel* v. *City of Wauwatosa,* 697 F.2d 743 (7th Cir. 1983), *cert. denied,* — U.S. —, 104 S. Ct. 484 (1984) (firefighters); *Arritt* v. *Grisell,* 567 F.2d 1267 (4th Cir. 1977) (city police officers); *EEOC* v. *Commonwealth of Pennsylvania,* 596 F. Supp. 1333 (M.D. Pa. 1984) (State highway patrolmen). New York State's mandatory retirement age limit of 55 for state police officers (Retirement and Social Security Law, § 381-b [subd. e], L. 1969 c. 3365, amended L. 1982, c. 862 § 1) is presently under challenge in federal court, as well. *EEOC* v. *State of New York,* No. 84-CV-12 (N.D.N.Y.).

ment laws for police or firefighters which violate the ADEA unless they reflect a BFOQ.

In each of these cases challenging the mandatory retirement age limit for law enforcement officers or firefighters, the State or its political subdivision has been required to establish *at trial* that age is a BFOQ. Since 1976, practically all of these cases have adopted the same BFOQ standard first set forth in an ADEA challenge brought against a *private* employer. *Usery* v. *Tamiami Trail Tours Inc.*, 531 F.2d 224, 236 (5th Cir. 1976). This strict standard requires that job qualifications on the basis of age be "reasonably necessary to the essence of [the] business" and that either "all or substantially all" members of a class "would be unable to perform safely and efficiently the duties of the job involved" or "that it is impossible or highly impractical to deal with" members of a class "on an individualized basis". *Harris* v. *Pan American Airways,* 649 F.2d 670, 676 (9th Cir. 1981), citing *Tamiami,* 531 F.2d at 236.

In applying the *Tamiami* standard, a number of courts, including the district court below, have found that age is not a BFOQ for law enforcement officers and firefighters. *Heiar* v. *Crawford County, Wisc.* 746 F.2d 1190 (7th Cir. 1984); *Orzel* v. *City of Wauwatosa,* 697 F.2d 743 (7th Cir. 1983); *EEOC* v. *City of St. Paul,* 671 F.2d 1162 (8th Cir. 1982). Accordingly, these courts ruled that the state or local law in question conflicts with the ADEA and is thus invalid.

These findings, seemingly compelled by the *Tamiami* standard, create a conflict whereby local and state laws are displaced because they are held to violate one part of a federal statutory scheme another part of which authorizes the federal government to do precisely what is forbidden to the states and municipalities. Such statutory conflict

could have been avoided had the courts not taken so limited a view. Simply recognizing that 5 U.S.C. § 8335(b) provides a reasonable federal standard upon which to establish a BFOQ for state and local police and firefighters would have obviated the need to find statutory conflict in these cases.

In the decision below, the Fourth Circuit adopted a common-sense approach. It refused to accept the notion that Congress would establish a mandatory retirement age limit for federal law enforcement officers and firefighters while, at the same time, placing state and local governments at risk that these same age limits might be found unlawful under federal law for identical occupations. Reluctant to make a determination that Congress adopted an occupational qualification that is not *bona fide* (731 F.2d at 213), the Fourth Circuit held that the federal age limit of 55 for police and firefighters is a reasonable standard applicable as a BFOQ to nonfederal police and firefighters. To do otherwise would have been to create judicially an unnecessary and irreconcilable conflict between federal and local law.

B. The Mandatory Retirement of State and Local Law Enforcement Officers and Firefighters at Age 55 Is Compatible With the Purposes and Objectives of Congress Under the ADEA and 5 U.S.C. § 8335(b).

1. *Congress Has Recognized That It Is Reasonably Necessary to Consider Age As a Factor In Establishing Employment Policies for Law Enforcement Officers and Firefighters.*

The legislative history of 5 U.S.C. § 8335(b) clearly shows that the same Congress which, in 1974, extended the ADEA to state and local governments had, nevertheless, concluded that age is a factor which may be considered in the employment of law enforcement officers and fire-

fighters. In establishing 55 as the basic age at which these employees are required to retire, Congress found that "these occupations should be composed, insofar as possible, of young men and women physically capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service. *They are occupations calling for the strength and stamina of the young rather than the middle aged.*" * (emphasis added). S. Rep. No. 93-948, 93d Cong. 2d Sess. (1974), 1974 U.S. Code Cong & Ad. News 3699. This finding was echoed on the floor of the House of Representatives. In support of the bill, Representative Dulski stated that law enforcement officers and firefighters "are different because we have asked them to do a difficult and dangerous job . . . . all of us will benefit by a younger, more active and more vigilant law enforcement and firefighting work force." 119 Cong. Rec. 30592 (1974). See also the comments of Representative Rangel (" . . . it takes young men to do the good job we require of them."), 119 Cong. Rec. 30594 (1974).

Petitioner Johnson suggests that this congressional language refers only to voluntary, not mandatory retirement (Pet. Br. p. 22). This suggestion is entirely mistaken. Prior to 1974, Congress had enacted legislation which provided incentives for federal police and firefighters to retire voluntarily at age 50. Pub. L. No. 80-879, 62 Stat. 122 (1948); Pub. L. No. 92-382, 86 Stat. 539 (1972). This approach

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* The legislative history of 5 U.S.C. § 8335(a) shows that Congress had previously reached the same conclusion with respect to air traffic controllers: "Although there are some exceptions to the general rule, most controllers are not able to control traffic in busy facilities at any age near 55—the physical and emotional strength required to do the job, to work odd and continuously changing work shifts, and to insure air safety for the traveling public is simply too much for any man in that age bracket." S. Rep. No. 92-774, 92d Cong. 2d Sess. (1972), 1972 U.S. Code Cong. & Ad. News 2289.

proved unsuccessful. Many employees remained on the job until age 70. H.R. Rep. No. 93-463, 93d Cong. 1st Sess. 3-4 (1973). Thus, a mandatory retirement age was established to rectify this situation and ensure that only relatively young people would serve in these occupations. The statutory language is clear, as is the legislative history.* In enacting 5 U.S.C. § 8335(b), Congress concluded, in 1974, that a mandatory retirement age limit is reasonably necessary to law enforcement and firefighting operations.**

Four years later, Congress again considered this issue in enacting the 1978 amendments to the ADEA. In its Report to Congress on the ADEA, the House Committee on Education and Labor reiterated the findings upon which 5 U.S.C. § 8335(b) had been based:

> While it is the primary purpose of this legislation to limit mandatory retirement and other employment discrimination for non-federal employees aged 40-69, . . . it is not intended that the bill prohibit mandatory retirement or other employment practices where age is a bona fide occupational qualification reasonably necessary to normal operation of a particular activity. . . . *It is recognized that certain mental and physical capacities may decline with age,*

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* The Senate report accompanying the bill recognized that it "provides for the mandatory retirement of law enforcement officers at age 55 . . ." 1974 U.S. Code Cong. & Ad. News 3699. Similarly, during consideration of the bill, Representative Leggett explained that "this bill would fix mandatory retirement at age 55 in most cases". 119 Cong. Rec. 30597 (1974). These statements also show that Congress had established age 55 as a focal point of its legislation. The EEOC's contrary argument is without merit. (EEOC Br., pp. 27-28).

** Indeed, in the Code of Federal Regulations it is clear that Congress has established age as a BFOQ for police officers and firefighters. The code implicitly refers to the statute as an illustration of a BFOQ. 29 C.F.R. § 860.102 (1981).

> *and in some jobs with unusually high demands, age may be considered a factor in hiring and retaining workers. For example, jobs such as some of those in air traffic control and in law enforcement and firefighting have very strict physical requirements on which the public safety depends.* (emphasis added)

H.R. Rep. No. 95-527, 95th Cong. 1st Sess. 12 (1977).

Moreover, in passing these 1978 amendments, Congress specifically considered and rejected a proposal to repeal 5 U.S.C. § 8335(b). In a letter setting forth the position of the House Post Office and Civil Service Committee, its chairman stated that age requirements "are necessary and can be justified by the particular occupations involved and, therefore, we are opposed to any attempt to repeal the authority for such age requirements." 123 Cong. Rec. 29003-29004 (1977).

It matters little that some members of Congress voted against repealing the statute not because they supported mandatory retirement but only because they believed that the retirement programs for police and firefighters should be reviewed more fully at a later time. 123 Cong. Rec. 30556 (1977). First, this sentiment hardly negates the fact that, in 1974, Congress clearly enacted 5 U.S.C. § 8335(b) to ensure that law enforcement officers and firefighters be relatively young. "It is the intent of the Congress that enacted [the section] that controls." *Teamsters* v. *United States,* 431 U.S. 324, 354 n. 39 (1977). Second, as shown by the letter above, the extent to which members of the House shared this belief is subject to dispute. Third, eight years have elapsed and the statute is still in effect. By implication, Congress continues to recognize that it is reasonably necessary to establish a mandatory retirement age for law enforcement officers and firefighters.

Finally, in support of its argument that Congress intended to distinguish between federal police and firefighters and their state and local counterparts, the EEOC notes that various sections of the ADEA provide different treatment for federal and nonfederal employees (EEOC Br., pp. 24-25). It is certainly true that some distinction is found. 29 U.S.C. §§ 626(c)(2), 630, 633a. However, to compel an employee to retire on the basis of age, both federal and nonfederal employers must establish that age is a BFOQ. Moreover, all of the ADEA distinctions between federal and nonfederal employment place a heavier burden on the federal government. Thus, for example, the ADEA covers nonfederal employees up to the age of 70, but provides no such ceiling for federal employees. 29 U.S.C. § 631(a)(b). It is one thing for Congress in a given area to require *more* of the federal government than of the states or their subdivisions.* It is quite another for Congress inexplicably to place a heavier burden on the states, with no discernible rationale for so doing. As the Fourth Circuit stated in its decision below, "A court should not lightly make such a determination as to Congressional purpose." 731 F.2d at 213.

2. *Congress Has Found That a BFOQ May Be Established by Means Other Than Case-by-Case Litigation.*

In its Report to Congress on the ADEA amendments of 1978, the Senate Human Resources Committee recognized that a BFOQ will usually be established on a case-by-case basis, but also expressed its concern "that litigation should not be the sole means of determining the validity of a bona fide occupational qualification." S. Rep. No. 95-493, 95th

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* We note, however, that New York law prohibits employment discrimination on the basis of age for all persons eighteen years or older, with no ceiling. New York Executive Law, § 296 (subd. 3-a).

Cong. 2d Sess. (1978), 1978 U.S. Code Cong. & Ad. News 514. The Committee recommended that guidelines be established for certain occupations.

It is, therefore, altogether reasonable for state and local governments to rely on an existing "guideline" established by Congress itself for law enforcement officers and firefighters. This reliance is enforced by congressional recognition of the need to ensure that relatively young persons occupy these positions.

Furthermore, nowhere in the legislative history of the ADEA or of 5 U.S.C. § 8335(b) did Congress distinguish between the demands placed on federal police or firefighters and on their state or local counterparts.* Although 5 U.S.C. § 8335(b) is limited by its terms to federal employees, the congressional findings giving rise to the statute are applicable, as well, to state and local employees.** No party here has suggested that fighting fires for the federal government is more arduous than doing so for Baltimore or New York City. Thus, the statute is a "reasonable federal standard" upon which state and local governments may rely in establishing a BFOQ. *EEOC* v. *Wyoming*, 460 U.S. 226, 240 (1983).

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* In fact, it appears that federal firefighting may be as much as thirteen times safer than state or local firefighting. See, *Special Retirement Policies as Related to Mandatory Retirement for Law Enforcement Officers, Firefighters and Air Traffic Controllers,* Subcom. on Compensation and Employee Benefits of the Sen. Comm. on Post Office and Civil Service, 95th Cong. 2d Sess. 13 (October 5, 1978).

** As noted, earlier, New York State has enacted legislation establishing a mandatory retirement age of 55 for state police officers. Retirement and Social Security Law § 381-b (subd. e). The legislative history of this statute reveals language remarkably similar to that found in the history of 5 U.S.C. § 8335(b): "A low mandatory retirement age is necessary for most members of the State Police. The strenuous and often hazardous physical demands of the job require young and vigorous men to fill the positions." (1969 New York Legislative Annual 56).

In its brief, the EEOC claims that the application of a standard which does not require a case-by-case determination will result in chaos (p. 17). On the contrary, the application of the *Tamiami* standard to police officers and firefighters continues to create doubt, confusion and inconsistency as to possible conflicts with federal law. After lengthy trials involving extensive expert testimony, some courts have found that age is not a BFOQ for law enforcement officers and firefighters. *Heiar* v. *Crawford County, Wisc.*, 746 F.2d at 1190; *Orzel* v. *City of Wauwatosa*, 697 F.2d at 743; *EEOC* v. *City of St. Paul*, 671 F.2d at 1162. Other courts have found that a BFOQ for age does exist. *EEOC* v. *Missouri State Highway Patrol*, 748 F.2d 447 (8th Cir. 1984); *Mahoney* v. *Trabucco*, 738 F.2d 35 (1st Cir. 1984), *cert. denied*, — U.S. —, 53 U.S.L.W. 403 (1984); *EEOC* v *Commonwealth of Pennsylvania*, 596 F. Supp. 1333 (M.D. Pa. 1984).

Moreover, courts reviewing identical evidence have reached different conclusions. In *Missouri State Highway Patrol*, the Eighth Circuit reversed the district court's conclusion that no BFOQ had been established, finding that the district court had erroneously ignored the testimony of a cardiologist and a physiologist. It was, however, the testimony of these same two experts regarding the testing of coronary health which the district court in *Trabucco* relied on in finding a BFOQ and which the district court discounted in this case. See 515 F. Supp. 1287, 1299-1300. Indeed, the Fourth Circuit noted this inconsistency in rejecting such an adjudicative, case-by-case approach where Congress had clearly set out to establish generic standards. See 731 F.2d at 215 n. 20.

C. Read *in Pari Materia*, the ADEA and 5 U.S.C. § 8335(b) Establish a Statutory Scheme Under Which Age 55 Is a BFOQ for Law Enforcement Officers and Firefighters.

Where two or more statutes deal with the same subject, they are of course to be read *in pari materia*. *Erlenbaugh* v. *United States*, 409 U.S. 239, 243 (1972). This rule applies with even greater strength when the two statutes at issue are enacted by the same legislative body at the same time. *Id.* at 244. In the same year Congress extended the ADEA to the federal, state and local governments, it expressly found and directed that law enforcement and firefighting are occupations that need to be staffed by relatively young persons.

The two recent statutes are easily harmonized. The ADEA permits consideration of age only insofar as it is a BFOQ reasonably necessary for the task that is to be performed. Under 5 U.S.C. § 8335(b), Congress has established that age is a reasonably necessary BFOQ for police and firefighters. By doing so, Congress established a federal standard to which state and local governments could at least refer in their attempts to comply with the ADEA. Such a construction avoids statutory conflict and advances congressional objectives.*

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* Despite petitioner's contrary assertion (Johnson Br., p. 17), the Court has not previously addressed this issue. *EEOC* v. *Wyoming*, 460 U.S. at 226, concerned only whether extending the ADEA to the states was in violation of Tenth Amendment protections. This Court was not asked to decide whether 5 U.S.C. § 8335(b) establishes a BFOQ for state or local law enforcement officers. Wyoming's brief (pp. 12-14) reveals only a request that it be allowed to establish a mandatory retirement age limit as Congress did in enacting § 8335(b). To be sure, in his dissent Chief Justice Burger assumed that 5 U.S.C. § 8335(b) is an exception to the ADEA limited to federal employees. This assumption, however, was made without the benefit of any significant discussion. No contrary position was argued.

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the United States Court of Appeals for the Fourth Circuit.

Dated: New York, New York
March 29, 1985

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